

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-676

BOWMAN TRANSPORTATION, INC.,

Appellant,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF ARKANSAS,

FORT SMITH DIVISION

**RESPONSE BY APPELLEES TO MEMORANDUM
FOR THE UNITED STATES AND THE INTERSTATE
COMMERCE COMMISSION**

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Appellees submit the following response to the Memorandum For The United States And The Interstate Commerce Commission filed March 12, 1976.

Appellees agree with the Government's position that summary disposition is appropriate.

Appellees also agree with the Government's observation (p. 6) that the District Court's decision does not irrevocably deprive appellant of anything. The decision did nothing more than direct the ICC to conform its grant of authority to the appellant's application so as to authorize appellant to perform *all* motor carrier operations it proposed to conduct and *all* operations for which a public need was found to exist. If additional authority is desired, an application for temporary and permanent authority therefor may be filed by appellant at any time.

The Government's memorandum states (p. 1) that the District Court directed a modification in the ICC's order that would preclude appellant "from providing through transportation service between the geographic areas covered by the new certificate and those points it presently serves." This is not accurate. The court fully upheld the agency's authorization for appellant to provide through service between all areas covered by the new certificate and all areas served by appellant at the time it presented its application, this being the full service proposed by appellant, the full service for which supporting evidence was presented, and the full service for which a public need was found. The court directed only that the Commission delete from its grant the excess authority for which there was *no supporting evidence* and *no finding of public need*, this being authority to conduct through service between the new area embraced within appellant's application and a limited area that was being served by another carrier (Alabama Highway Express) at the time of the hearing.

The Government suggests (p. 5) that "the district court's reading of appellant's application is unduly restrictive." The court, however, found that "[t]here is

nothing ambiguous in the application or in the notice describing the proposal."¹ (J.S. App. 36). It is also suggested (p. 6) that appellees should have raised their objection to the grant of such excess authority "in the proceeding in which appellant purchased that [Alabama Highway Express] authority." As found by the District Court "[t]he contention is without merit . . ." (J.S. App. 36). Appellees had no standing in that proceeding since they had and now have no objection to anything that was proposed or authorized therein.²

The Government states (p. 5, note 3) that after appellant purchased the Alabama Highway Express authority "all pleadings filed in this proceeding expressly stated" appellant's intention to join or tack such authority with that sought in this proceeding. This is not correct. All such pleadings reaffirmed appellant's intention to join the sought-after authority *only* with the authority that appellant held at the time of the hearing (see Appellees' Motion to Affirm, pp. 11-12).

Appellees' position concerning the scope of the District Court's review upon remand is presented on pages 15-16 of the Motion to Affirm.

1. The Government's brief in the District Court (p. 20) admitted that the ICC improperly granted such excess authority if the applicant "indicated that it *did not intend* to tack these rights with any others to be subsequently obtained." As noted, the District Court found that the applicant had *clearly* indicated that it did not intend to do so; therefore, such excess grant was improper.

2. It is noted that one participant in the Bowman-Alabama Highway Express case sought to predicate objections upon operating rights not yet issued by the Commission. The Administrative Law Judge ruled that such contentions could not be considered. (See Report and Recommended Order, Interstate Commerce Commission Docket No. MC-F-9921, p. 7, App. 4, Brief of Plaintiffs and Intervening Plaintiff on Remand, filed in District Court June 16, 1975.)

Appellees agree with the Government that no substantial question is presented by this appeal. The judgment of the District Court should be affirmed.

Respectfully submitted,

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